IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 11 OF 2002

Shri Datta Rajaram Bhosle,
major of age, service,
r/o Post Carona, Rambhuvan
Wada, Bardez-Goa. ... Appellant

versus

1. Smt. Kavita Datta Bhosle,
of major age, housewife,
r/o Rambhuvan Vadda,
Kumbarjua-Ilhas Goa.

2. Kumar Rajaram Datta Bhosle,
minor, represented by his
mother Smt.Kavita Bhosle
(above named) ... Respondents

Mr. D. P. Bhise, Advocate for the Appellant.

Mr. Rodolf Castro, Advocate for the Respondents.

CORAM : N. A. BRITTO, J.

DATE : 24TH NOVEMBER,2005.

ORAL JUDGMENT

This could be considered as defendant's second appeal arising from the defendant's Civil Suit filed by him for divorce

on the grounds available to the defendant under the Law of Divorce namely, cruelty or ill-treatment, adultery and desertion or abandonment of conjugal domicile. This second appeal was admitted by Order of this Court dated 19-4-2002 on substantial questions of law which are enumerated in Clauses a, b and c of para 8 of the Memorandum of Appeal. It is not necessary to reproduce them herein.

2. There is no dispute that the plaintiff-wife married the defendant-husband on 21-3-1990 and came to reside at the defendant's house at Pomburpa where she had to live with the defendant and his two unmarried sisters. A child was born to them on 16-4-1991. The plaintiff on or about 12-4-1990 went to her mother's house at Cumbarjua and thereafter when both of them namely, the plaintiff-wife and the defendant-husband attended a wedding at Mapusa, the former accompanied the latter and returned to the matrimonial house at Pomburpa. There is no dispute that the plaintiff-wife left the matrimonial house at Pomburpa for the last time on 11-5-1991 and after that the plaintiff-wife filed a suit on 20-11-1992 for restitution of conjugal rights and for maintenance for herself and for the said

son. There is also no dispute that the plaintiff-wife left the matrimonial house on 11-5-1991 early in the morning by leaving behind her minor son whom she collected only on the next day. The defendant-husband in an answer to the plaintiff-wife's suit for restitution of conjugal rights, stated that his wife had left the conjugal home without any cause and though he had tried to collect her by all means, the wife did not respond and as such there was no cause of action giving rise to the said suit for restitution of conjugal rights. Later, the defendant filed a suit on or about 7-8-1999 for divorce on grounds stated herein above. At the request of both the parties, evidence was recorded in both the suits and as a result a common Judgment came also to be passed by virtue of which the plaintiff-wife's suit for restitution of conjugal rights and for maintenance was decreed by the trial Court whilst the defendant's suit for divorce was dismissed with costs. The defendant-husband carried an appeal before the District Court and in the course of hearing of the said appeal it was conceded on behalf of the defendant-husband that there was no evidence to support the grounds urged by the defendant-husband of cruelty or ill-treatment and of adultery.

3. At the hearing of this appeal, Mr. D. P. Bhise, the learned Counsel has submitted that there was no evidence produced by the plaintiff-wife to substantiate the allegation of ill-treatment levelled by her against her husband. It is submitted by Mr. Bhise that the plaintiff-wife left the matrimonial house on 11-5-1991 voluntarily and before the filing of the suit by the defendant the requisite period of desertion or abandonment of conjugal domicile was completed and, therefore, the defendant-husband was entitled to a Decree of Divorce on the ground of desertion.

4. On the other hand, Mr. Rodolf Castro, the learned Counsel of the plaintiff has submitted that so-called substantial questions of law as framed and on which this second appeal was admitted do not arise at all as they are purely questions of fact which have been decided by the trial Court and the decision of the trial Court has been affirmed by the first appellate Court. Mr. Castro has further submitted that the ground of desertion was also not available to the defendant-husband as the plaintiff-wife had to leave the matrimonial

house not because she wanted to desert the husband but because she was ill-treated at the hands of her husband and his sisters.

5. A second appeal can be entertained only on substantial questions of law and the opposite party is certainly entitled to agitate that a substantial question of law as framed does not arise in the second appeal and this is precisely the case herein. The questions as framed on behalf of the defendant-husband in para 8 of the Memorandum of Appeal namely, questions a, b and c are matters relating to the appreciation of evidence and are not at all questions of law, much less substantial questions of law.

6. As already stated, the plaintiff-wife left the matrimonial house on 11-5-1991 and admittedly that was on the next day of the naming ceremony of their son Damodar. It was the case of the plaintiff-wife that on the said occasion, the said two unmarried sisters, his brother Sharau and married sisters Smt. Mira and Smt.Kamal joined together and abused her one after another and then the said two unmarried sisters and the defendant-husband assaulted her and when she became unconscious she was dumped in the room under

lock where she passed the whole night and when she regained consciousness on the next day she begged the defendant-husband to open the door and allow her to wash her face(mouth wash) and after her long request prayer, the defendant opened the door and she came into the bathroom and on the pretext of having a face wash slipped therefrom through the rear door with torn and shabby clothes on her body and ultimately returned to her mother's house. The defendant-husband in his cross-examination and contrary to his written statement admitted that after 11-5-1991 when Kavita left the matrimonial house he had not made any effort to bring her back to the matrimonial house but his wife-Kavita had made some efforts through one of the members of Shiv Sena by name Bhonsle to take her back in the matrimonial house. The very fact that the plaintiff-wife made efforts to return to the matrimonial house goes to show that she never had any intention to desert the defendant or abandon the conjugal domicile and for that very reason she had filed the suit for restitution of conjugal rights. It was also admitted by the defendant-husband that after 11-5-1991 the defendant and some other members of his family were arrested by the Police and this arrest certainly lent weight to the allegation of the plaintiff-wife that she was ill-treated on the night of 10/11-5-1991 and as a result of

the said ill-treatment she was compelled to leave the matrimonial house. Both the Courts below have found that the evidence of the wife was consistent while that of the husband was inconsistent and wavering. In the background of the said facts, it could not be said that the plaintiff-wife had left the matrimonial house out of her free will but on the contrary she left the matrimonial house because of the ill-treatment meted out to her not only on the said night but probably even before as was alleged by her. If the plaintiff-wife left the house due to the ill-treatment it is but obvious that she had no animus descerendi to leave the matrimonial house and always showed her willingness to return to the matrimonial house and even made efforts in that direction. Considering the said facts, both the Courts below were fully justified in concluding that the defendant-husband was not entitled for a Decree of Divorce on the ground of desertion or complete abandonment of conjugal domicile as well, and if at all the plaintiff-wife had to leave the matrimonial house it was because of the ill-treatment meted out to her by the defendant and his close relations.

In the light of the above, there is no merit in this second appeal. Consequently the same is hereby dismissed with costs.

N. A. BRITTO, J.

RD.